Supreme Court, U.S.
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No. 96-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

CALVIN K. ADAM,

Petitioner,

vs.

DICKINSON PLACE CHARITABLE CORPORATION
and
DONALD LEARNER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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47 pp

QUESTIONS PRESENTED

1. Under what circumstances does a court of appeals err in refusing to consider an Americans with Disabilities Act issue newly raised on appeal?

2. Is bi-polar disorder an "inherently substantially limiting" condition under the Americans with Disabilities Act and the Rehabilitation Act of 1973, as amended?

3. What specific allegations by a plaintiff are necessary to establish substantial limitations on a major life activity pursuant to the Americans with Disabilities Act and the Rehabilitation Act of 1973, as amended?

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No. 96-

IN THE

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CALVIN K. ADAM,

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DICKINSON PLACE CHARITABLE CORPORATION
and
DONALD LEARNER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Calvin K. Adam petitions for a writ of certiorari to review the opinion and judgment of the Court of Appeals for the Fifth Judicial Circuit entered in this case on June 12, 1997.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (Appendix A) is not reported. Its denial of rehearing (Appendix B) is not reported.

The judgments of the District Court for the Northern District of Texas, Dallas Division (Appendix D; Appendix G) in this case are not reported. The District Court's opinion and order (Appendix C) is not reported.

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit was entered on June 12, 1997. The Fifth Circuit's order denying rehearing was entered on July 24, 1997. The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1254 (1994).

STATUTES INVOLVED

42 U.S.C. § 12182(a) (1994):

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12102(b) (1994):

The term "disability" means, with respect to an individual-

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.

29 U.S.C. § 706(8)(B) (1994):

Subject to subparagraphs (C), (D), (E), and (F), the term "individual with a disability" means, for the purposes of sections 701, 713, and 714 of this title, and subchapters II, IV, V, and VII of this chapter, any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

29 U.S.C. § 794(a) (1994):

No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied by the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committee.

STATEMENT OF THE CASE

This case arises under the Americans with Disabilities Act ("ADA") and the Rehabilitation Act of 1973, as amended. The central issues presented by this petition are: (1) when an ADA plaintiff has established a *prima facie* case concerning presence of disability; and (2) whether a federal appeals court may refuse to consider an argument on the basis it was not raised in the district court where the argument was addressed in briefing to the district court, would clearly necessitate reversal of the district court's

decision, and failure to consider it would result in manifest injustice. It is petitioner's central contention that the Fifth Circuit's decision is at odds with the ADA and prior decisions of this Court.

President George Bush signed the ADA on July 26, 1990, and the law took effect on July 26, 1992. The ADA is the world's first comprehensive civil rights law for people with disabilities. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND U.S. DEP'T OF JUSTICE, THE AMERICANS WITH DISABILITIES ACT HANDBOOK, October 1991, at 1 of Preamble. In passing the ADA, Congress expressly acknowledged the vast numbers of Americans potentially dependent upon the ADA for protection of their fundamental rights:

> The Congress finds that-
> (1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older . . . .

42 U.S.C. § 12101 (1994).

1. *Calvin K. Adam's Complaint*

Dickinson Place Charitable Corporation ("DPCC") is a non-profit, tax-exempt Texas corporation that exists ostensibly for the purpose of providing housing and related services to senior citizens and handicapped persons or couples under the Department of Housing and Urban Development. DPCC also sponsors the East Dallas Senior Citizens Center. Federal funds from the Older Americans Act are granted to the states through the Administration on Aging with oversight by the Department of Health and Human Services. These funds are eventually granted to senior citizens centers, such as the East Dallas Senior Citizens Center.[1]

Calvin K. Adam is a seventy-one year old resident of Dallas, Texas. Following service in the United States Navy, he received a degree in petroleum engineering and then worked twenty-seven years for Mobil Oil Corporation. Mr. Adam

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1 The facts set forth in this petition are contained in the original complaint filed in the district court, and in the summary judgment response filed by Mr. Adam. Because this appeal arises from a summary judgment motion, the district and appellate courts were bound to accept these facts as true.

suffers from the manic-depressional mental condition of bi-polar disorder.

Mr. Adam and his wife signed a Dickinson Place apartment lease in October of 1991. Mr. Adam's wife died on March 19, 1993. Following the death of his wife, Mr. Adam was subjected to continued harassment by Dickinson Place and its manager, Donald Learner. Mr. Adam was an outspoken advocate of fair treatment for senior citizens. Mr. Learner began referring to Mr. Adam's mental condition, telling other residents he was "crazy" and "out of control."

Eventually, Mr. Adam was evicted from Dickinson Place. This eviction was based upon false allegations that Mr. Adam had been disruptive and threatened other residents.

After his eviction, Mr. Adam attempted to gain access to the East Dallas Senior Citizens Center and its services. Dickinson Place and Mr. Learner denied him that access. In fact, they called the Dallas Police Department and threatened criminal prosecution of Mr. Adam if he attempted to gain access to the center.

2. *The District Court's Decision*

On April 8, 1996, Mr. Adam filed suit against Dickinson Place and Mr. Learner in the Dallas County District Court alleging violations of the ADA and the Rehabilitation Act of 1973, as amended ("Rehabilitation Act"). The case was removed to the United States District Court for the Northern District of Texas, Dallas Division. The district court had federal question jurisdiction of the case pursuant to 28 U.S.C. § 1331 (1994) because a violation of federal statute was alleged. After removing the case to federal court, Dickinson Place and Mr. Learner asserted counterclaims against Mr. Adam.

Dickinson Place and Mr. Learner sought summary judgment on a variety of grounds, including the argument that Mr. Adam was not a disabled person within the meaning of the ADA and Rehabilitation Act. Mr. Adam responded to that motion, and tendered an affidavit stating that he suffered from "a manic depressional mental condition, known as bi-polar disorder" that "limits my life activities." The affidavit also recounted Mr. Learner's snide and untrue remarks about Mr. Adam's mental condition.

On October 2, the district court entered its memorandum opinion and order granting the summary judgment motion. The sole basis for the district court's decision on the ADA and Rehabilitation Act claims was its opinion that Mr. Adam had failed to establish that he was "disabled" within the meaning of the statutes. In the district court's opinion, Mr. Adam's testimony that his bi-polar condition limited his life activities was insufficient to establish a *prima facie* case under federal disability law. The district court then entered judgment dismissing Mr. Adam's claims.

Mr. Adam filed a motion for new trial. In connection with his motion, Mr. Adam set forth the various activities limited by his condition, and also pointed out his contention that he was disabled by virtue of being regarded as disabled by Mr. Learner. By order dated October 15, 1996, the district court denied the motion.

When Dickinson Place and Mr. Learner pointed out that judgment had been rendered notwithstanding their pending and unresolved counterclaims, the district court modified its earlier order and reinstated the counterclaims. Dickinson Place and Mr. Learner then dismissed their

counterclaims, and the district court entered another opinion and judgment dated January 24, 1997. By its revised judgment, the district court dismissed Mr. Adam's claims with prejudice and the counterclaims without prejudice.

3. *The Fifth Circuit's Opinion*

Mr. Adam appealed the district court's decision to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1291 (1994). The Fifth Circuit reviewed the district court's decision *de novo* and affirmed it. Because a notice of appeal was filed before the district court modified its judgment, and another notice of appeal was filed after the revised judgment, the Fifth Circuit assigned two appeal numbers that were subsequently consolidated.

On appeal, Mr. Adam advanced two primary arguments. First, he contended that his testimony had raised a genuine issue of material fact as to whether Dickinson Place and Mr. Learner regarded him as being disabled, thereby rendering him within the purview of the ADA and Rehabilitation Act. Second, he argued that his testimony concerning limitation of his life activities was sufficient to establish a *prima facie* case of disability.

Dickinson Place and Mr. Learner urged the Fifth Circuit not to consider whether Mr. Adam was regarded as being disabled because, in their estimation, the argument had not been raised in the district court. By his reply brief, Mr. Adam pointed out that the argument had been raised in the district court. He also argued that the issue fell squarely within established federal caselaw permitting consideration of new arguments on appeal where refusal to do so would result in an incorrect result and miscarriage of justice.

The Fifth Circuit affirmed the district court's decision, concluding that Mr. Adam's testimony about his disability was "conclusional" and failed to raise a genuine issue of material fact concerning the presence of a disability. The Fifth Circuit refused to consider what it termed a "newly raised" argument that he was perceived as being disabled.

Mr. Adam filed a petition for rehearing, which was denied on July 24, 1997.

REASONS FOR GRANTING THE WRIT

1. *The Fifth Circuit's Decision Misapprehends This Court's Prior Decisions Concerning Consideration of New Issues on Appeal*

Federal law prohibits discrimination in connection with public accommodations on the basis of disability:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a) (1994); *see also* 29 U.S.C. § 794(a) (1994). Under federal law, the term "disability" includes "being regarded as having . . . an impairment." 42 U.S.C. § 12102(b) (1994); 29 U.S.C. § 706(8) (1994). The Fifth Circuit refused to consider Mr. Adam's argument that he was perceived as being disabled on the basis it had not been raised in the district court. As this Court has noted, however, "[r]ules of practice and procedure are devised to promote the ends of justice, not to defeat them." *Hormel v. Helvering*, 312 U.S. 552, 557 (1940).

In *Singleton v. Wulff*, 428 U.S. 106 (1976), this Court rejected the notion that federal appeals courts are uniformly precluded from considering newly raised issues on appeal. While declining to establish any general rule for when such issues are properly considered, and instead leaving that decision to the discretion of the courts of appeals, this Court did provide some guidance to the inquiry:

> Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, see *Turner v. City of Memphis*, 369 U.S. 350 (1962), or where "injustice might otherwise result." *Hormel v. Helvering*, 312 U.S., at 557.

Singleton, 428 U.S. at 121.

Singleton makes clear that the appeals courts possess significant discretion in deciding which newly raised issues are properly considered. At the same time, it is equally clear that *Singleton* did not contemplate unfettered discretion in this regard. The decision expressly states that the issue is left "primarily" to the discretion of appeals courts, and strongly implies that where resolution of the issue is beyond any

doubt and injustice would otherwise result, a federal court of appeals errs in refusing to consider a newly raised issue.

That is precisely the situation in this case. The issue presented is purely legal in nature - did the evidence present a genuine issue of material fact that precluded summary judgment? Resolution of this legal issue is beyond any doubt. Accepting all Mr. Adam's evidence as true, which is mandatory in the summary judgment context, would mean a factual conclusion that Dickinson Place and Mr. Learner perceived Mr. Adam as suffering from a mental condition that rendered him "crazy" and "out of control." *See, e.g., Stradley v. LaFourche Communications, Inc.*, 869 F. Supp. 442 (E.D.La. 1994) (fact issue precluding summary judgment existed where defendant perceived plaintiff as suffering depressive disorder).

Accepting this evidence of a "disability" as true, it is clear that the Fifth Circuit's refusal to consider this issue resulted in manifest injustice. A person disabled within the meaning of the ADA and Rehabilitation Act has by this refusal been rendered unable to vindicate his federally guaranteed right against discrimination. It is difficult to imagine a clearer instance of manifest injustice.

Congress enacted the ADA in order "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . . ." 42 U.S.C. § 12101(b) (1994). In its sweeping mandate against discrimination, the ADA mirrors previous civil rights statutes addressing discrimination on the basis of race, religion, national origin, creed, age, and gender. *See, e.g.*, 29 U.S.C. § 621 (1994); 42 U.S.C. § 2000e (1994).

The legislative history of the ADA indicates that "Congress intended [the regarded-as] part of the definition to protect people from a range of discriminatory actions based on 'myths, fears, and stereotypes' about disability, which occur even when a person does not have a substantially limited impairment." 1 EEOC TECHNICAL ASSISTANCE MANUAL § 2.2(a), *reprinted in* ADA MANUAL (BNA) § 90:0512 (1992). A person may suffer a "disability" for terms of the statute without actually having the disability merely by virtue of the perception of such disability.

Congress intended to ensure a forum for vindication by disabled persons of their right to be free of discrimination. The Fifth Circuit has denied Mr. Adam such a forum by refusing to consider an argument that would clearly

necessitate reversal of the summary judgment and permit him a full hearing of his complaint in the district court. A decision that so clearly results in manifest injustice constitutes reversible error.

2. *This Case Presents An Important Federal Statutory Issue That Was Resolved Incorrectly by the Court of Appeals*

The issue presented by this appeal is critically important to the operation of the ADA and to millions of potential ADA litigants. The importance of this federal statutory issue merits further review. *See, e.g., United States v. Ruzicka*, 329 U.S. 287 (1946). After all, every ADA plaintiff in the nation is confronted with the burden of establishing a *prima facie* case.

As a general proposition, an ADA plaintiff must establish specific limitation resulting from the claimed disability. Certain conditions, however, are inherently substantially limiting. 29 C.F.R. Pt. 1630, App. (1996) ("[o]ther impairments, however, such as HIV infection, are inherently substantially limiting"). Bi-polar disorder is such an inherently substantially limiting condition.

It is undisputed that Mr. Adam suffers from bi-polar disorder. Bi-polar disorder differs from regular depression in that its victims experience both phases of manic depressive illness, mania and depression. David Dunner & G. Andrew Benjamin, *Bipolar Affective Disorder (Manic Depressive Illness)*, BAR EXAMINER, Nov. 1994, at 25. It is difficult to conceive how a condition that causes alternating episodes of mania and depression could not limit a person's major life activities.

Independently, Mr. Adam established his own particular limitations. The lower courts concluded Mr. Adam failed to establish his disability because he failed to aver any evidence that his mental condition substantially limited one or more of his major life activities. In the affidavit Mr. Adam tendered to the district court, he specifically stated that his bi-polar condition "limits my life activities." The lower courts rejected this testimony, terming it conclusory.

The rejection of Mr. Adam's sworn testimony was erroneous. That testimony was factual in nature - Mr. Adam testified that his life activities are limited by his medical condition. If Mr. Adam were asked at trial whether his bi-polar condition limits his life activities, such a question would

be permissible. Moreover, if answered in the affirmative, it would permit a reasonable jury to conclude that Mr. Adam has a disability under the terms of the ADA. Consequently, the testimony establishes a genuine issue of material fact as to whether Mr. Adam is disabled under the ADA. After all, Mr. Adam's burden to establish a *prima facie* case is not onerous.

Likewise, the determination that the testimony is "conclusory" is incorrect. Mr. Adam did not merely assert conclusory allegations that a prima facie case exist. Had Mr. Adam simply testified "I am disabled," that would have been a conclusory allegation. Mr. Adam's affidavit went further, establishing that the disability limits his life activities. The lower courts apparently believed that Mr. Adam had to describe how the disability limits which life activities. While such testimony might ultimately be necessary to persaude a jury at trial, the testimony set forth by Mr. Adam (when accepted as true) is enough to establish a genuine issue of material fact concerning the existence of disability.

Mr. Adam's condition is inherently substantially limiting, and it substantially limits his major life activities.

CONCLUSION

The opinion of the Court of Appeals represents a decided setback to just and equitable operation of the ADA. The petition for a writ of certiorari should be granted.

Respectfully submitted,

s/Charles Baruch

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Counsel for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-11377
No. 97-10150
Summary Calendar

CALVIN K. ADAM,

Plaintiff-Appellant,

versus

DICKINSON PLACE CHARITABLE CORPORATION; DONALD LEARNER,

Defendants-Appellees.

- - - - - - - - - -

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:96-CV-1358-D

- - - - - - - - - -

Before Wisdom, Jones, and Benavides, Circuit Judges.

PER CURIAM:*

Calvin Adam was denied access to the East Dallas Senior Citizen's Center, a federally funded facility located on the premises of a senior-citizen's housing facility owned by

---

* The court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

Dickinson Place Charitable Corporation ("Dickinson") and administered by Donald Learner. Adam filed suit against Dickinson and Learner alleging that he suffers from a manic-depressive bipolar disorder and contending that he was denied access to the Center because of his mental condition in violation of § 12182(a) of the Americans with Disabilities Act and §794 of the Rehabilitation Act. The district court found that Adam failed to present evidence from which a trier of fact could infer that he was disabled within the meaning of the Acts and entered summary judgment in favor of Dickinson and Learner, dismissing Adam's disability-discrimination claim with prejudice. On appeal Adam argues that the district court erred in finding that he failed to present qualifying evidence that he was "disabled" within the meaning of the Americans with Disabilities Act or the Rehabilitation Act of 1973. He also argues that the district court erred in failing to find that he was perceived as being disabled. We have reviewed the record and the briefs of the parties and conclude that summary judgment was appropriate. Adam's conclusional allegation that his mental condition "limits [his] life activities" is insufficient to create a genuine issue of

material fact.[1] Adam's newly raised argument that he was discriminated against based on a perceived disability does not rise to the level of plain error.[2]

AFFIRMED.

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1 *See* Waggonner v. City of Garland, Texas, 987 F.2d 1160, 1166 (5th Cir. 1993).

2 *See* Highlands Ins. Co. v. Nat'l Union Fire Ins. Co., 27 F.3d 1027, 1031-32 (5th Cir. 1994), *cert. denied*, 513 U.S. 1112 (1995).

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-11377
No. 97-10150

CALVIN K. ADAM,

Plaintiff-Appellant,

versus

DICKINSON PLACE CHARITABLE CORPORATION;
DONALD LEARNER,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Texas, Dallas

ON PETITION FOR REHEARING

Before WISDOM, JONES, and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above cases is denied.

ENTERED FOR THE COURT:

/s/

JOHN MINOR WISDOM
UNITED STATES CIRCUIT JUDGES

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF
THE MANDATE.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CALVIN K. ADAM,	§	
	§	
Plaintiff,	§	
	§	Civil Action No.
VS.	§	3:96-CV-1358-D
	§	
DICKINSON PLACE	§	
CHARITABLE CORP.	§	
and DONALD LEARNER,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

In this removed action for relief pursuant to the Americans With Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 et seq., and the Rehabilitation Act of 1973 ("Rehabilitation Act"), 29 U.S.C. § 794, defendants move for judgment on the pleadings or for summary judgment. The court reaches only the portion of the motion in which defendants move for summary judgment. For the reasons that follow, the court grants the motion.

Appendix - 6

I

Plaintiff Calvin K. Adam ("Adam") brings this action against defendants Dickinson Place Charitable Corporation ("Dickinson Place") and Donald Learner ("Learner"). Adam's suit arises from a denial of access to the East Dallas Senior Citizens Center ("the Center"), a federally-funded center that provided meals and other services to senior citizens. The Center is operated on the premises of a senior citizen housing facility owned by Dickinson Place, and administered by Leaner, a Dickinson Placę employee. Adam allegedly suffers from manic depressive bipolar disorder. He contends that he was denied access to the Center based on his mental condition. Adam maintains that bipolar disorder is a disability within the ADA and Rehabilitation Act, and that exclusion from the Center based on this condition violates the ADA's prohibition of discrimination by operators of places of public accommodation. Adam also asserts that defendants' conduct abridges § 794 of the Rehabilitation Act, which prohibits discrimination by programs receiving federal financial assistance. Defendants move for summary

judgment, contending inter alia that Adam does not suffer from a "disability" within the meaning of the ADA or the Rehabilitation Act.

II

A.

To establish a claim under Title III of the ADA for the denial of access to a place of public accommodation, plaintiff must demonstrate: (1) that he has a disability; (2) that the facility is a place of public accommodation; and (3) that he was denied full and equal enjoyment of the goods and services provided by the facility because of his disability. See United States v. Morvant, 898 F. Supp. 1157, 1161 (E.D. La. 1995).

To recover based on § 794 of the Rehabilitation Act, plaintiff must show: (1) that he has a disability; (2) that he is otherwise qualified to receive services; (3) that the relevant program received federal financial assistance; and (4) that he was denied access to the services based on his disability. See Sharrow v. Bailey, 910 F. Supp. 187, 193 (M.D. Pa. 1995).

B

1

The court need only reach defendants' contention that they are entitled to judgment as a matter of law because Adam has failed to adduce any evidence that he suffers from a "disability," as defined by the ADA and the Rehabilitation Act.

To establish a claim under either the ADA or the Rehabilitation Act, a plaintiff must demonstrate that he suffers from a "disability" as defined by those Acts.* See Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 162 (5th Cir. 1996). With respect to an individual, "disability" means a physical or mental impairment that substantially limits one or more of the individual's major life activities, a record of such an impairment, or being regarded as having such an impairment. See 42 U.S.C. § 12102(2); 29 U.S.C. § 706(8)(b).

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* It is commonly accepted that the term "disability" under the ADA and under the Rehabilitation Act was intended to have the same meaning. Subsequent discussions of and references to the term "disability" should be understood to apply equally to both Acts.

Adam's bipolar disorder does not constitute a per se disability under ADA or the Rehabilitation Act. See Taylor, 93 F.3d at 163 & n.6. Most impairments, including bipolar disorder, have a varied disabling effect depending on the particular individual who suffers from the impairment, the stage of the disease or disorder, the presence of other impairments that combine with the named impairment to make it disabling, or any other number of factors. Id. at 164 (citing 29 C.F.R. app. § 1630.2(j) (1995)). Thus in order to carry his summary judgment burden, Adam must adduce evidence that would permit a reasonable trier of fact to find that he has a condition that substantially limits one or more of his major life activities. See Coghlan v. H.J. Heinz Co., 851 F. Supp. 808, 813 (N.D. Tex. 1994) (Kendall, J.) (to carry summary judgment burden, plaintiff must come forward with evidence sufficient to demonstrate a genuine issue of material fact on issue of "substantially limits").

When summary judgment movants seek judgment on an issue as to which the nonmovant will bear the burden of proof at trial, the movants may satisfy their burden by pointing out to the court that there is an absence of evidence

to support the nonmovant's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). The movants are not required to produce evidence to negate the opponent's claims. Rather, they need only demonstrate that the evidence that does exist does not "present a sufficient disagreement to require submission to a jury." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). If the movants meet this obligation, the burden then shifts to the nonmovant to go beyond his pleadings and, by his own affidavits or by depositions, answers to interrogatories, and admissions on file, designate specific facts showing a genuine issue for trial. Id. at 256.

The evidence produced must create a fact issue concerning the existence of every component of the nonmovant's case, Dunn v. State Farm Fire & Cas. Co., 927 F.2d 869, 872 (5th Cir. 1991); naked assertions of an actual dispute unsupported by facts will not suffice, nor will the mere allegations of the pleadings. Solo Serve Corp. v. Westowne Assocs., 929 F.2d 160, 165 (5th Cir. 1991). Furthermore, the evidence introduced by the nonmovant in response to a motion for summary judgment must have significant probative value. If the evidence is merely

colorable or not significantly probative, summary judgment may be granted. Anderson, 477 U.S. at 249-50. The mere existence of a scintilla of evidence is insufficient. Id. at 252.

2

In the present case, defendants have pointed the court to the complete absence of evidence that Adam suffers from a "disability" as defined by the ADA and Rehabilitation Act. See D. Br. at 4-5, 7; D. Rep. at 2. Defendants note that Adam has failed even to allege that his condition substantially limits one or more of his major life activities. See D. Br. at 5; D. Rep. at 3-4. Adam must establish that he suffers from a "disability" in order to fulfill an essential element of both of his claims. He must adduce evidence that would permit a reasonable trier of fact to find that he suffers from a cognizable disability.

Although Adam's initial burden is merely to establish a prima facie case, this does not mean that he may rely on conlcusory allegations that the elements of a prima facie case exist. Perhaps because Adam has incorrectly analyzed defendants' motion solely in terms of a Rule 12(c) motion for judgment on the pleadings, he has failed to offer evidence

sufficient to permit a jury to find in his favor. Yet defendants clearly denominated their motion as one for "judgment on the pleadings or summary judgment." (Emphasis added). Therefore, Adam's contention that the court must assume the factual allegations of his complaint to be true is of itself insufficient to avoid summary judgment. See P. Resp. at 4 n.2. In response to defendants' motion, Adam merely offers to amend his pleading to allege that his bipolar condition "limits his life activities," and his own affidavit making the identical claim. This is an inadequate opposition argument. Neither the mere assertion of an actual dispute, nor the allegations of his complain, can satisfy Adam's burden.

Accordingly, the court holds that Adam cannot recover against defendant on his claims under the ADA and Rehabilitation Act, and that defendants are entitled to judgment as a matter of law.

III

In his response to defendants' motion, Adam requests that the court grant Fed. R. Civ. P. 56(f) relief as an alternative to outright denial of defendants' motion. P. Resp. at 5. The court will freely grant a party's request for such

relief where there is reason to believe that additional discovery will enable the nonmovant to obtain evidence creating a fact issue as to all elements of his claims, or where it appears that there has been inadequate opportunity for discovery. In the present case, however, Adam's case fails due to a complete absence of evidence of an essential element of his case--that Adam has a disability. This is proof that, if it exists, is in Adam's exlcusive control. Obtaining discovery from defendants will not assist Adam in proving that he has a "disability" within the meaning of the ADA and Rehabilitation Act. Accordingly, the concludes that Rule 56(f) relief is unwarranted, and denies Adam's request.

IV

After defendants filed their motion for judgment on the pleadings or for summary judgment, Adam filed a motion for leave to amend his complaint to add a 42 U.S.C. § 1983 claim for violation of his First Amendment rights. Defendants oppose Adam's request for leave, contending that the amendment would be futile because defendants' actions are so closely bound with the government as to become state actors.

There are two bases on which to deny Adam's motion for leave. First, the court may deny leave to amend when the amendment would be futile. See FDIC v. Connor, 20 F.3d 1376, 1385 (5th Cir. 1994) (holding that "leave to amend need not be granted when it would be futile to do so"). Adam contends in the proposed amended complaint that defendants are state actors based on the receipt of federal funding. This obviously does not make them state actors. In McKinney v. Aladdin Beauty College, Civil Action No. 3:94-CV-2254-D (N.D. Tex. Aug. 23, 1995) (Fitzwater, J.), the court addressed a similar issue:

> The court first considers Aladdin's contention that state action is lacking, thus precluding a § 1983 cause of action. Aladdin argues that it is a private college and therefore could not have terminated McKinney under "color of state law." McKinney responds that the requisite state action is present because Aladdin is subject to federal licensing, receives federal funding, and provides financial aid to its students through the use of federal funds. P. Br. at 11.

> The court holds that McKinney has not adduced sufficient evidence to sustain a finding of state action. It should be obvious that state action means just that--some nexus to a state rather than to the federal government. See, e.g., Lugar v. Edmonson Oil Co., 457 U.S. 922, 937 (1982). Even assuming that McKinney has introduced evidence of federal involvement with Aladdin, she has not demonstrated sufficient state connections for a finding of state action.

Slip op. at 2 (emphasis at original). The court therefore holds that Adam's attempt to allege state action, based only upon federal funding of the Center would be futile.

Second, where, as here, Adam filed the motion for leave to amend after defendants have moved for summary judgment, the court need not grant leave to amend. See, e.g., Overseas Inns S.A.P.A. v. United States, 911 F.2d 1146, 1151 (5th Cir. 1990) (affirming this court's decision to deny motion for leave to amend after summary judgment filed, and reprinting this court's reasoning).

* * *

Defendants' motion for summary judgment is granted, and this action is dismissed by judgment filed today.

SO ORDERED.

October 2, 1996.

/s/

Sidney A. Fitzwater
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CALVIN K. ADAM,	§	
	§	
Plaintiff,	§	
	§	Civil Action No.
VS.	§	3:96-CV-1358-D
	§	
DICKINSON PLACE	§	
CHARITABLE CORP.	§	
and DONALD LEARNER,	§	
	§	
Defendants.	§	

JUDGMENT

For the reasons set out in a memorandum opinion and order filed today, it is ordered and adjudged that plaintiff's action against defendants is dismissed with prejudice.

Taxable costs of court, as calculated by the clerk of court, are assessed against plaintiff.

Done at Dallas, Texas this 2nd day of October, 1996.

/s/

Sidney A. Fitzwater
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CALVIN K. ADAM,	§	
	§	
Plaintiff,	§	
	§	Civil Action No.
VS.	§	3:96-CV-1358-D
	§	
DICKINSON PLACE	§	
CHARITABLE CORP.	§	
and DONALD LEARNER,	§	
	§	
Defendants.	§	

ORDER

Plaintiff Calvin K. Adam's motion for new trial is denied.

SO ORDERED.

October 15, 1996.

/s/

Sidney A. Fitzwater
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CALVIN K. ADAM,	§	
	§	
Plaintiff-,	§	
Counterdefendant,	§	
	§	Civil Action No.
VS.	§	3:96-CV-1358-D
	§	
DICKINSON PLACE	§	
CHARITABLE CORP.	§	
and DONALD LEARNER,	§	
	§	
Defendants-	§	
Counterplaintiffs.	§	

ORDER

On December 11, 1996, the court entered a memorandum opinion and order holding that its October 2, 1996 judgment is not final because defendants-counterplaintiffs have a pending counterclaim, and the court did not enter the judgment pursuant to Fed. R. Civ. P. 54(b). On December 18, 1996 defendants-counterplaintiffs filed a motion for reconsideration and to stay proceedings. On

January 22, 1997, they filed a Rule 41(a)(1) notice of dismissal of their counterclaim. The court has today entered an order dismissing the counterclaim without prejudice. See N.D. Tex. R. 9.2 ("A voluntary dismissal or stipulation of dismissal of a civil case under Rule 41(a)(1), Federal Rules of Civil Procedure, shall be accompanied by a proposed order of dismissal"). The court has also entered a final judgment. Accordingly, the December 18, 1996 motion for reconsideration and to stay proceedings is denied as moot.*

In addition to the usual recipients, the clerk of this court shall transmit a copy of this order, and of the order of dismissal and judgment filed today, to the clerk of the court of appeals for such use as that court may deem proper.

SO ORDERED.

January 24, 1997.

/s/

Sidney A. Fitzwater
United States District Judge

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* For the reasons stated in the court's December 11, 1996 memorandum opinion and order, the court concludes that it has jurisdiction to enter orders and judgment in question. Because the appeal from the October 2, 1996 judgment is not taken from a final judgment, this court is not divested of jurisdiction. See Mem. Op. at 2.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CALVIN K. ADAM,	§	
	§	
Plaintiff-,	§	
Counterdefendant,	§	
	§	Civil Action No.
VS.	§	3:96-CV-1358-D
	§	
DICKINSON PLACE	§	
CHARITABLE CORP.	§	
and DONALD LEARNER,	§	
	§	
Defendants-	§	
Counterplaintiffs.	§	

JUDGMENT

For the reasons set out in a memorandum opinion and order filed October 2, 1996, and the court having by order filed today dismissed without prejudice the counterclaim of defendants-counterplaintiffs, it is ordered and adjudged that plaintiff's action against defendants is dismissed with

prejudice and defendants-counterplaintiffs' counterclaim against plaintiff is dismissed without prejudice.

Taxable costs of court, as calculated by the clerk of court, are assessed against plaintiff.

Done at Dallas, Texas this 24th day of January, 1997.

/s/

Sidney A. Fitzwater
United States District Judge